STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2267

State of Minnesota,
Respondent,

vs.

Stephanie Ann Taylor,
Appellant.

Filed February 18, 2014
Affirmed
Larkin, Judge

Hennepin County District Court
File No. 27-CR-12-8310

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Michael O. Freeman, Hennepin County Attorney, J. Michael Richardson, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

Karen Eileen Mohrlant, F. Clayton Tyler, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Larkin, Judge; and Kirk, Judge.

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

On appeal from her conviction of first-degree driving while impaired (refusal to submit to chemical testing), appellant challenges the district court's denial of her motion to dismiss. We limit our review to the issues that are properly before this court on appeal: whether the state's warrantless attempt to collect a urine sample from appellant was unconstitutional and whether the collection process was constitutionally unreasonable. We conclude that the attempted collection of appellant's urine sample was constitutional and therefore affirm.

FACTS

On March 16, 2012, Crystal police found appellant Stephanie Ann Taylor unconscious in the driver's seat of a vehicle stopped in the middle of a road. After an officer woke Taylor, she denied alcohol consumption but admitted that she had taken some prescription medications, including Valium and "something for depression or anxiety." An officer administered a preliminary breath test, which returned an alcohol-concentration reading of .00, but Taylor failed four of five field sobriety tests. The police arrested her for driving while impaired (DWI) and transported her to the Crystal Police Department.

At the police department, Officer Timothy Tourville read Taylor an implied-consent advisory. The advisory informed Taylor, among other things, that before making a decision about testing, she had the right to consult with an attorney; refusal to take a test is a crime; and that she would be considered to have refused the test if the test were

unreasonably delayed or if she refused to make a decision. Taylor declined to speak with an attorney and agreed to take a urine test.

Tourville took Taylor to a cell designated for females and juveniles to produce a urine sample. Tourville told Taylor that because no female officers were on duty, he would witness the administration of the urine test. Taylor responded, "You have to watch me? For real?" Tourville told her that he needed to be present to make sure she did not tamper with the sample and that he would do everything he could to make her comfortable.

Taylor sat on the toilet in the cell and attempted to provide an adequate urine sample for about 31 minutes. During that time, Taylor made multiple requests for more time, claiming she was unable to urinate. Tourville primarily stood in the threshold of the cell door, about six to eight feet from Taylor and turned slightly away from her. At times, however, he would face Taylor or enter the cell to respond to questions or requests to turn on the water faucet. Taylor used her large, baggy shirt and pants to shield her genitals from view. Tourville never saw Taylor's genitals or any other unclothed body parts.

After 31 minutes had passed, Tourville told Taylor that he would not provide her with any more time and that her failure to provide a sample would be deemed a refusal. He read the implied-consent advisory a second time and offered Taylor the opportunity to provide a blood sample. Taylor refused.

Respondent State of Minnesota charged Taylor with first-degree refusal to submit to chemical testing. Taylor moved the district court to suppress evidence of her urine-test

refusal and dismiss the charge. She argued that (1) "[t]he warrantless attempt to collect her urine was a violation of her rights under the Fourth Amendment" and article I, section 10 of the Minnesota Constitution; (2) "[t]he method of collection, specifically having male officers visually monitor her attempts to provide a urine sample, was an unnecessary, excessive infringement of her reasonable expectation of privacy in violation of the Fourth Amendment" and article I, section 10 of the Minnesota Constitution; and (3) the method of collection violated her right to due process under the United States and Minnesota Constitutions. After an evidentiary hearing, the district court denied Taylor's motion in its entirety.[1]

The case was tried to a jury, and the jury found Taylor guilty. The district court sentenced Taylor to serve 75 months in prison. Taylor appealed, contending that "[b]ecause the warrantless search and the manner of the search were unconstitutional, this [c]ourt should suppress the evidence appellant refused the test, vacate her conviction, and dismiss the test-refusal charge." Taylor's principal brief focused on the "warrantless collection of a urine sample." After briefing was complete but before oral arguments, this court stayed the appeal pending the supreme court's decision in *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013). After *Brooks* was decided, we scheduled the case for oral argument and received supplemental briefing from the parties.

[1] Taylor states that the district court ruled on her motion in a written order filed on or about July 20, 2012. Taylor included a copy of the order in her appendix. We note, however, that the district court's order is not included in the electronic appellate file that was transmitted to this court from the district court. Because neither party disputes that the order was filed as indicated by Taylor, its absence from the appellate record appears to have been a simple oversight.

D E C I S I O N

I.

In her principal brief, Taylor argues that "[t]he warrantless collection of a urine sample to test for the presence of a substance other than alcohol [was] not justified by exigent circumstances" and therefore constituted an unreasonable search under the United States and Minnesota Constitutions. "When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing—or not suppressing—the evidence." *State v. Harris*, 590 N.W.2d 90, 98 (Minn. 1999). We review the district court's findings of fact under a clearly erroneous standard, but legal determinations are reviewed de novo. *State v. Bourke*, 718 N.W.2d 922, 927 (Minn. 2006).

The United States and Minnesota Constitutions prohibit the unreasonable search and seizure of "persons, houses, papers, and effects." U.S. Const. amend. IV; Minn. Const. art. I, § 10. "Taking blood and urine samples from someone constitutes a 'search' under the Fourth Amendment." *Brooks*, 838 N.W.2d at 568. Warrantless searches are per se unreasonable, subject to limited exceptions. *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992). The state bears the burden of establishing the existence of an exception to the warrant requirement. *State v. Ture*, 632 N.W.2d 621, 627 (Minn. 2001).

The district court, relying on *State v. Shriner*, concluded that exigent circumstances justified a warrantless search because Tourville "would have no way of knowing the rate at which [the unknown narcotics in Taylor's body] metabolize and the delay to procure a warrant could well have resulted in the destruction of the evidence."

See State v. Shriner, 751 N.W.2d 538, 545 (Minn. 2008) (holding that "[t]he rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw from a defendant, provided that the police have probable cause to believe that defendant committed criminal vehicular operation"), *abrogated by Missouri v. McNeely*, 133 S. Ct. 1552 (2013).

But after Taylor filed notice of appeal to this court, the United States Supreme Court decided *McNeely*, which abrogated *Shriner* and held that "the natural metabolization of alcohol in the bloodstream" does not constitute "a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement" and that "exigency in this context must be determined case by case based on the totality of the circumstances." *McNeely*, 133 S. Ct. at 1556. We stayed this appeal pending the outcome of *Brooks*, which was remanded from the United States Supreme Court "for further consideration in light of *McNeely*." *Brooks*, 838 N.W.2d at 567.

Brooks is dispositive here. In *Brooks*, the supreme court considered three consolidated cases. *Id*. In each case Brooks was arrested for suspicion of DWI, was read an implied-consent advisory, and took either a blood or urine test. *Id*. at 565-66. Brooks argued that "under *McNeely*, the warrantless searches of his blood and urine cannot be upheld solely because of the exigency created by the dissipation of alcohol in the body." *Id*. at 567. The supreme court agreed that the searches were not justified based on the exigency created by the dissipation of alcohol in the body, but noted that the "police do not need a warrant if the subject of the search consents." *Id*. at 567-68.

The supreme court described the consent exception to the warrant requirement as follows:

> For a search to fall under the consent exception, the State must show by a preponderance of the evidence that the defendant freely and voluntarily consented. Whether consent is voluntary is determined by examining the totality of the circumstances. Consent to search may be implied by action, rather than words. And consent can be voluntary even if the circumstances of the encounter are uncomfortable for the person being questioned. An individual does not consent, however, simply by acquiescing to a claim of lawful authority.
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> . . . This analysis requires that we consider the totality of the circumstances, including the nature of the encounter, the kind of person the defendant is, and what was said and how it was said.

Id. at 568-69 (quotations and citations omitted).

The supreme court explained that "the nature of the encounter includes how the police came to suspect Brooks was driving under the influence, their request that he take the chemical tests, which included whether they read him the implied consent advisory, and whether he had the right to consult with an attorney." *Id*. at 569. The supreme court concluded that Brooks's consent was voluntary in all three cases because he did not dispute that the police had probable cause to believe he had been driving under the influence; he did not "contend that police did not follow the proper procedures established under the implied consent law"; the police read "the implied consent advisory before asking him whether he would take all three tests, which makes clear that drivers have a choice of whether to submit to testing"; the "police gave Brooks access to telephones to contact his attorney and he spoke to a lawyer"; and "[a]fter consulting with

his attorney, Brooks agreed to take the tests in all three instances." *Id*. at 569-70. The supreme court further noted that although Brooks was in custody, he "was neither confronted with repeated police questioning nor was he asked to consent after having spent days in custody." *Id*. at 571.

In this case, Taylor likewise does not dispute that the police had probable cause to arrest her for DWI. She does not contend that the police did not follow the proper implied-consent procedures. Tourville read Taylor the implied-consent advisory, which made it clear that she could refuse the test. And although Taylor elected not to consult with an attorney, she did so after Tourville read the implied-consent advisory, which explained that she had the right to consult with an attorney and that a telephone and directory would be available to her. Taylor was not confronted with repeated police questions, nor did she acquiesce to the urine sample after having spent days in custody. For those reasons, we conclude that Taylor consented to the urine sample; the record does not suggest that Taylor was coerced into providing the sample. *See id*. ("[N]othing in the record suggests that Brooks was coerced in the sense that his will had been overborne and his capacity for self-determination critically impaired." (quotation omitted)). Moreover, the fact that Taylor later refused a blood test shows that she knew she had the choice to refuse chemical testing. *Cf. State v. Dezso*, 512 N.W.2d 877, 881 (Minn. 1994) (concluding that the defendant's consent was not voluntary where "the nature of the questions asked and the answers given" provided "no indication that defendant was aware that he could refuse to let the officer see [his] wallet").

In her supplemental brief, Taylor argues that "unlike Brooks, who agreed to and did submit to testing in each of his cases, [she] did not agree to submit to a blood test," and "[b]ecause [she] did not submit or agree to submit to blood testing, the consent exception does not apply in this case." Taylor further argues that "[b]ecause [she] did not consent to the administration of a test and no other exception to the warrant requirement applied, the request that she submit to a blood test was not constitutionally reasonable." In effect, even though Taylor's arguments in district court focused on the state's warrantless attempt to obtain a urine sample, she now focuses on the state's warrantless attempt to obtain a blood sample.

We do not consider Taylor's arguments regarding her blood-test refusal because she did not raise them in the district court.[2] *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996) ("This court generally will not decide issues which were not raised before the district court, including constitutional questions of criminal procedure."). Moreover, Taylor did not raise them as an issue in her principal brief to this court. *See State v. Yang*, 774 N.W.2d 539, 558 (Minn. 2009) (stating that issues raised "for the first time in [an appellant's] reply brief [in a criminal case]," having not been raised in respondent's brief, are "not proper subject matter for [the] appellant's reply brief," and they may be deemed waived). In sum, we limit our review to the issues raised and determined in the district court and hold that the warrantless attempt to obtain a urine sample from Taylor

[2] The transcript of the motion hearing reveals that Taylor's only argument regarding the blood test was that evidence regarding her refusal of that test should be suppressed as fruit of the state's warrantless attempt to obtain a urine sample. *See State v. Jackson*, 742 N.W.2d 163, 177-78 (Minn. 2007) ("Generally, evidence seized in violation of the constitution must be suppressed.").

was constitutional under the consent exception to the warrant requirement. *See Brooks*, 838 N.W.2d at 567-572.

II.

Taylor argues that "[b]ecause direct visual monitoring by opposite-sex officers was a substantial infringement on [her] legitimate expectation of privacy and there were viable alternatives available to protect the government's legitimate interests in obtaining a valid sample, the manner of the search was constitutionally unreasonable."[3]

The manner in which a search is conducted is part of the reasonableness inquiry under the Fourth Amendment. *State v. King*, 690 N.W.2d 397, 402 (Minn. App. 2005), *review denied* (Minn. Mar. 29, 2005). "[W]hat constitutes an unreasonable search must be assessed based on the facts of each particular case." *State v. Davis*, 732 N.W.2d 173, 178 (Minn. 2007). "As part of this particularized inquiry, Minnesota courts have balanced the nature and significance of the intrusion on the individual's privacy interests against the gravity of the public concerns it serves and the degree to which the conduct at issue advances the public interest." *Id*. (quotation omitted).

Taylor first argues that the district court clearly erred in its finding that she "did not indicate an objection either to producing a sample or to the way in which the test was conducted." Taylor argues that she "clearly objected to visual monitoring by a male officer" when she asked Tourville "You have to watch me? For real?" and further asked whether he could turn his back.

[3] Taylor does not challenge the district court's ruling on her due-process challenge to the method of collection.

Even if the district court clearly erred in finding that Taylor did not object to Tourville's presence while she attempted to produce an adequate urine sample, we nonetheless conclude that the manner in which Tourville conducted the urine collection was not unconstitutionally unreasonable. Although the Supreme Court has recognized that "the process of collecting [a urine] sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination . . . implicates privacy interests," *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617, 109 S. Ct. 1402, 1413 (1989), in this case the intrusion was minor compared to the public interest involved.

For most of the period during which Taylor attempted to produce a urine sample, Tourville stood six to eight feet away with his head turned. He faced Taylor and entered the cell only to respond to her questions or requests. The district court found that "[a]t no time did . . . Tourville observe her genitals or any other unclothed body parts." Although there is some dispute as to whether a female officer was available to observe the urine collection, there is no constitutional requirement that a member of the same sex monitor the collection of a urine sample. *See Booker v. City of St. Louis*, 309 F.3d 464, 468 (8th Cir. 2002) ("Nor do we believe that the Constitution requires same-sex monitoring."). By contrast, the public has a "compelling" interest in protecting residents from drivers under the influence of a controlled substance. *See State v. Mellett*, 642 N.W.2d 779, 784 (Minn. App. 2002) (concluding, in the context of a right-to-privacy challenge, that "because the legislature has a compelling state interest in protecting state residents from drunk drivers, and an important part of the implementation of that interest is the testing of those whom officers have probable cause to believe have been drinking and are driving while

impaired, that balancing test favors intrusion by the state on privacy rights held by appellant"), *review denied* (Minn. July 16, 2002).

Taylor relies on a Ninth Circuit right-to-privacy case in which a male parole officer observed a female parolee submit to a urine test, *Sepulveda v. Ramirez*, 967 F.2d 1413, 1415 (9th Cir. 1992). But in *Ramirez*, the male officer entered the bathroom stall where the parolee was partially unclothed. *Id*. He refused to leave the stall when asked; laughed and told the parolee that she "did not have anything he had not seen before"; had a view "from within the toilet stall [that] was neither obscured nor distant"; and "remained in the stall while [the female parolee] finished urinating, cleaned herself, and dressed." *Id*. at 1415-16. Thus, the level of privacy intrusion that occurred in *Ramirez* far exceeded the intrusion in this case.

In sum, although it would have been preferable for a female officer to monitor the collection of Taylor's urine sample, the manner in which Tourville conducted the search was not constitutionally unreasonable.

Affirmed.